92-1659

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

XYZ CORPORATION, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the effort of company employees in compiling information and preparing analyses at the request of counsel to assist the company in defense of a criminal investigation is protected by the work product doctrine?

PARTIES TO THE PROCEEDING BELOW

This petition is filed on behalf of all appellants in the court below. This case arose out of a civil contempt proceeding in connection with a grand jury investigation. The United States was the sole appellee. With the exception of the United States, all parties have been referred to by pseudonyms to protect the secrecy of the grand jury. XYZ Corporation is a target of the grand jury investigation.* XYZ Corporation's work product immunity is at issue on this petition. There are five additional petitioners, the remaining appellants below. John Doe #1, #3, #5, and #6 are four employees of XYZ Corporation who asserted privilege on the Company's behalf in the grand jury. Richard Roe is the President of XYZ Corporation and has also been identified as a target of the grand jury investigation.

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* A letter identifying the true name of XYZ Corporation has been lodged with the Clerk under seal. Pursuant to Rule 29.1, petitioners state that XYZ Corporation has no parent corporation and no subsidiary corporations (except wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
Summary	2
The Grand Jury Investigation	3
Proceedings In The District Court	5
Proceedings In The Court Of Appeals	6
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION BELOW UNDERMINES THE WORK PRODUCT DOCTRINE BY ELIMINATING PROTECTION FOR "ORDINARY" OR "FACT" WORK PRODUCT PREPARED BY A PARTY, AT THE REQUEST OF COUNSEL, TO AID IN ITS OWN DEFENSE	9
II. THE DECISION BELOW CREATES A SERIES OF ANOMALIES AND UNDERMINES THE ATTORNEY-CLIENT PRIVILEGE	18
III. THE DECISION BELOW PRESENTS A CLEAR CONFLICT WITH THE PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES

	Page
Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486 (9th Cir. 1989)	16
Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975)	9, 12, 15
Ford v. Phillips Elecs. Instruments, Co., 82 F.R.D. 359 (E.D. Pa. 1979)	18
FTC v. Grolier Inc., 462 U.S. 19 (1983)	10
Hickman v. Taylor, 329 U.S. 495 (1947)	*passim*
In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844 (8th Cir. 1988)	15-16
In re Int'l Sys. & Controls Corp., 693 F.2d 1235 (5th Cir. 1982)	15
In re Murphy, 560 F.2d 326 (8th Cir. 1977)	12, 16
In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007 (1st Cir. 1988)	12, 15
In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982)	16
International Business Mach. Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975)	18
Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1980)	17
National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980 (4th Cir. 1992)	15
Sporck v. Peil, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985)	15
Toledo Edison Co. v. G A Technologies, Inc., 847 F.2d 335 (6th Cir. 1988)	15
United States v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977)	15
United States v. Nobles, 422 U.S. 225 (1975)	10, 20
United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)	19
Upjohn Co. v. United States, 449 U.S. 383 (1981)	*passim*

STATUTES

28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	3

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1345 3
28 U.S.C. § 1826 3

FEDERAL RULES

Fed. R. Civ. P. 26 ..... *passim*

OTHER AUTHORITIES

4 J. Moore et al., Moore's Federal Practice ¶ 26.64 (2d ed. 1993) 12, 16, 18, 19
Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760 (1983) 18, 19

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated November 19, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated November 19, 1992 is reported at 979 F.2d 939 and is set forth in the Appendix at 1a-15a. The district court order which gave rise to the appeal is not reported and is set forth in the Appendix at 16a-33a. The district court opinion as set forth in the Appendix substitutes appropriate pseudonyms for the names of the parties involved.

JURISDICTION

The opinion of the Court of Appeals was issued and judgment entered on November 19, 1992. A timely petition for rehearing was denied on January 15, 1993. App. at 34a-35a. This petition is filed within ninety days of the denial of the petition for rehearing. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition presents the question whether the effort of company employees who gather information at the direction of counsel in order to defend the company in a grand jury investigation is protected by work product immunity. The court below held that the work product doctrine does not bar opposing counsel from inquiring into the fact-finding and analysis performed by such employees, or into the conclusions they reached as a result of their efforts. As shown below, that holding is in direct conflict with the decisions of this Court and other circuits considering these issues. Because the decision below addresses an issue confronted daily by litigants preparing complex cases for trial, it will have an immediate and pervasive impact in many cases now pending in the federal courts. If uncorrected, it will affect the conduct of litigants in virtually every future case involving complex facts.

Summary

The government initiated this action on March 10, 1992 by obtaining an order to show cause why six grand jury witnesses, employees of XYZ Corporation (the "Company"), who had asserted the Company's attorney-client and work product privileges in response to questions posed to them in the grand jury, should not be held in contempt.[1] The district court had subject matter jur-

[1] Contempt proceedings against two of the six employee-witnesses were dismissed because it turned out that they had never been asked the questions that were the subject of the order to show cause.

isdiction over the civil contempt proceeding pursuant to 28 U.S.C. §§ 1826, 1331 and 1345. The Company itself, and Richard Roe, Chairman and President of the Company—targets of the investigation—intervened to protect the Company's privilege claims. They moved (along with the witnesses) to quash the grand jury subpoenas with respect to questions about studies these employees had done at the specific request of counsel to assist the Company in formulating its defense.

On June 8, 1992, the United States District Court for the Eastern District of New York for the most part denied the motion to quash and directed the witnesses to respond to the questions posed by the prosecutor about the studies they conducted. On November 19, 1992, a panel of the Court of Appeals for the Second Circuit affirmed, with modification, the "district court's order compelling [the employee-witnesses] to answer certain listed questions . . . ." App. at 12a.[2] On January 15, 1993, the Court of Appeals denied Appellants' Joint Petition for Rehearing.

The Grand Jury Investigation

As noted by the court below, "the facts in this case are straightforward and undisputed." App. at 3a.

The Company is in the business, *inter alia*, of designing and building sophisticated timing mechanisms used in satellites and in other applications. *Id.* A grand jury in the Eastern District of New York has been investigating the Company and its senior management with respect to certain subcontracts between the Company and another firm in connection with a project for a federal government agency (the "Fox contracts"). App. at 3a-4a. It is apparently the prosecutor's position that the Company overstated its costs when submitting vouchers for work performed on those subcontracts. App. at 4a.

[2] The questions at issue are appended to the opinion of the court below. They are set forth at App. 13a-15a.

The Company learned of the investigation when search warrants were executed and grand jury subpoenas were served for Company records, and promptly retained outside counsel to begin considering its defense. In January 1991, counsel asked employees familiar with certain technical aspects of the Fox program to address issues relevant to the Company's potential defenses.[3] The employees did so, reporting to counsel on the results of their efforts.

One year later, on January 27, 1992, the government conducted pre-grand jury interviews of Company employees who had been involved in those earlier efforts for counsel. In those interviews, the government inquired about any analyses these employees had performed. Upon learning that the prosecutor was making such inquiries, counsel for the Company wrote to the prosecutor and to the employee-witnesses' personal counsel, asserting the Company's attorney-client and work product privileges. The Company asked the government to refrain from asking questions about work performed for Company counsel. App. at 5a.

The next day, the government asked several witnesses the contested questions in the grand jury. Each witness

[3] The affidavits submitted to the district court establish that each employee knew that counsel had commissioned the analysis, that the employees had respected their obligation to maintain confidentiality, and that the employees reported their results to counsel. *See* App. at 27a.

One theory of defense required that estimates be made by persons familiar with hardware for the subcontracts: a frequency source amplifier, a voltage controlled crystal oscillator, a frequency multiplier power amplifier, a calibration upconverter, a reference generator unit, and a surface acoustic wave oscillator. App. at 4a-5a. An *in camera* affidavit of counsel, submitted to the court below, explains this initial theory of defense and how the efforts of the employee-witnesses fits in with that theory. *See* App. at 26a. It is sufficient for purposes of this petition to note the uncontested fact that the work that was performed by these employees was performed for counsel in order to assist in the Company's defense.

declined to answer, asserting privileges on the Company's behalf.[4] *Id.* The government then obtained an order to show cause why the employees should not be held in contempt.

Proceedings In The District Court

The government provided the court and the parties with paraphrased versions of the questions at issue. It identified various questions which it had actually asked the witnesses (Category "I," App. at 13a), and provided an additional set of questions that it proposed to ask in the future (Category "II," App. at 13a-14a). The questions (and responses by the witnesses to the Category "I" questions) demonstrate that the government sought to inquire directly about the analyses these employees performed for Company counsel after the Company had learned of the investigation. The Category "II" questions inquire even more deeply and directly into the employees' undertaking and the conclusions they drew from their efforts.[5] *See* App. at 13a-14a.

The Company had suggested that because the government had available to it all of the relevant records, the government could simply ask the witnesses to conduct analyses of the government's choosing, instead of asking them about the analyses they had done for Company counsel. *See* App. at 5a. The government declined to adopt the Company's suggestion. *Id.* It did, however,

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[4] Several of the witnesses read a statement in response to the prosecutor's questions setting forth their understanding that the Company was asserting the confidentiality of the attorney-client privilege and work product doctrine for "all information and materials generated" at the direction of counsel. App. at 5a.

[5] The written reports containing the employees' estimates and conclusions were submitted by the Company to the district court for *in camera* inspection, along with affidavits of counsel. The government has repeatedly conceded, and the district court and Court of Appeals accepted (App. at 7a, 26a), that these *written* reports are privileged and need not be disclosed.

formulate a third set of questions which it submitted to the district court. (Category "III," App. at 14a-15a). The Company conceded that these "Category III" questions, which do *not* inquire about the analyses performed for counsel, could properly be asked by the government (provided the witnesses were instructed to answer from their pre-existing knowledge of the underlying facts and without reference to their work for Company counsel).

The district court nonetheless rejected the Company's privilege claims. The court noted that the government did not dispute that copies of the written reports were protected by the attorney-client privilege. App. at 26a. The court held, however, that the government was free to inquire orally about the employees' efforts and the conclusions drawn from those efforts because those efforts and conclusions were "underlying facts and opinions." App. at 30a.

Proceedings In The Court Of Appeals

On appeal of the district court's order, the Company stressed that the "analyses performed . . . and the factual results requested by the government are not *pre-existing* facts known to the witnesses prior to their communications with counsel: they are new facts specially created at the request of counsel." Thus, the application "of the privileges to these analyses does not hide something that the witnesses knew before they communicated with counsel[. I]t protects a body of information that did not exist until after counsel requested it."

Nonetheless, the Second Circuit affirmed the district court's decision in substantial part. It held that by "[e]xamining the 23 questions we see no trampling of either privilege, except in four questions."[6] App. at 10a.

[6] *See* App. at 14a. The questions the panel deemed improper (Nos. 8, 9, 14, 15) were those which inquired into or referred to actual discussions with counsel. The court said that "[t]he form of these four questions, considered in sequence, risks violation of the attor-

Specifically, with respect to work product, it concluded that because the "attachments to the affidavits appear to be nothing but straightforward calculations from raw data," the work product protection does not apply. App. at 11a.

REASONS FOR GRANTING THE WRIT

This petition presents an important question about the right of a company and its counsel to enlist the assistance of the company's employees in preparing to defend a civil or criminal lawsuit. In holding that the efforts of such employees are not protected as work product, the decision below conflicts with this Court's precedents and the decisions of other federal courts of appeals on a fundamental question of federal law and federal practice. If uncorrected, the decision will have a pervasive impact on investigations and trial preparation in a wide variety of cases.

The decision below creates a rule that "no common law privilege" prevents a party from first establishing that his adversary's employees conducted purely factual analyses at the direction of counsel in anticipation of litigation, and then inquiring further:

> "[W]hat did you do [to analyze the facts in issue]?"
>
> "[W]hat analysis did you conduct?"
>
> "What reviews of [the disputed contracts] did you conduct?"
>
> "What conclusions did you draw?"

App. at 13a, 14a (Questions I.1; I.3; I.4; II.A.13).

Any attorney who has tried to make an initial assessment of a client's position in connection with a complex case, or who has tried to prepare such a case for trial,

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ney-client privilege because the witness, in responding, might be understood to be implying to the grand jury that he had conveyed privileged information to the lawyer." App. at 11a.

knows how important it is to be able to obtain the assistance of company employees in rooting out the facts, testing theories and arriving at conclusions about how best to proceed. The need to draw upon the resources of the client to gather, analyze, and decipher technical or financial data arises in virtually all such cases. Indeed, it is the right of a litigant—whether it be a company through its employees, or an individual through his or her own action—to assist in its own defense, without fear that its efforts will be automatically discoverable by its adversary.

In holding that "no common law privilege" bars opposing counsel from inquiring directly into the efforts of a litigant and its employees to prepare a defense (at least so long as those efforts do not appear to involve mental impressions), the court below has reached a result sharply at odds with the law set forth in this Court's decisions. The decision of the court below would provide a ready mechanism by which a litigant could bootstrap on the efforts of its more diligent opponent to investigate and gather the facts—a result heretofore regarded, under this Court's decisions, as inconsistent with the premises of the adversary system. Indeed, a party need only threaten suit and, if the target of the threat responds by calling in counsel and conducting a thorough investigation, that party may simply claim the fruits of the investigation (at least in unwritten form) for its own.

Because it addresses a core aspect of discovery and case preparation, the immediate effects of this decision will be far-reaching, limiting the ability of attorneys in both criminal and civil cases to enlist the aid of their clients' employees in preparing their cases. The risk of disclosure will cause many litigants to think twice before embarking upon any significant effort at case analysis and fact-finding, knowing that the product of that effort will be discoverable by the opposing side. The prejudice borne by the client in these circumstances will *not* be redressed,

for those who are dissuaded by this decision from proceeding with a thorough investigation will not have any right of appeal. On the other hand, attorneys who have relied on the decisions of this Court to enlist the aid of their clients' employees for assistance in gathering facts for trial will now find the product of their efforts disclosed to their opponent. But despite the importance of the question presented, it is not likely to reach the court again soon because questions of privilege are frequently interlocutory in nature, and are not readily appealed.

Thus, certiorari should be granted in this case to restore work product immunity to a litigant's own efforts in preparing a defense.

I. THE DECISION BELOW UNDERMINES THE WORK PRODUCT DOCTRINE BY ELIMINATING PROTECTION FOR "ORDINARY" OR "FACT" WORK PRODUCT PREPARED BY A PARTY, AT THE REQUEST OF COUNSEL, TO AID IN ITS OWN DEFENSE

Since this Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), the federal courts have recognized that a party's efforts in anticipation of, or preparation for, litigation, are presumptively shielded from discovery by the work product principle. The court below nonetheless observed that "[w]hether the work product of counsel gathered and devised in preparation for litigation, such as facts, legal contentions or trial tactics, may be discovered is a highly controversial area of the law, as this case illustrates. The boundaries of the [work product] doctrine are far from fixed."[7] App. at 9a.

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[7] The assessment of the court below mirrored a similar assessment nearly twenty years ago in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975): "[T]he most controversial problem in the discovery area is the extent to which a party may require divulgence of facts, legal contentions, or trial tactics gathered or devised by his adversary in preparation for litigation." In the 20

Notwithstanding that observation, presumably addressed to the treatment of work product by the lower courts, this Court has repeatedly reaffirmed the existence of work product immunity as a "basic rule in the litigation context." *FTC v. Grolier, Inc.*, 462 U.S. 19, 24 (1983); *see Upjohn Co. v. United States*, 449 U.S. 383 (1981); *United States v. Nobles*, 422 U.S. 225 (1975); *Hickman*, 329 U.S. 495. The " 'strong public policy' underlying the work product doctrine," *Upjohn*, 449 U.S. at 398, has uniformly been taken as the guidepost in its application.

The work product privilege allows a litigant "a certain degree of privacy, free from unnecessary intrusion by opposing parties . . . [to] prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 510-11. Although the work product "privilege" is frequently asserted in civil cases, it is even more "vital" in criminal cases because "the question of guilt or innocence demands that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Nobles*, 422 U.S. at 238.

The rationale for the rule is simply that without it, a litigant will be constrained in mounting its defense by the fear that its own efforts will prove even more beneficial to its adversary than to itself:

> Were [work product] materials open to opposing counsel on mere demand . . . [i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the

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years since *Duplan*, apparently little has been done to eliminate the controversy in this fundamental area of practice. As evidenced by the decision of the court below, there continues to exist a tendency to treat the resolution of cases involving the work product doctrine as calling for the weighing of broad policies, instead of applying the precedents established by this Court.

> clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511. As noted in *Upjohn*, "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." 449 U.S. 383, 396 (1981), *quoting Hickman*, 329 U.S. at 516 (Jackson, J., concurring).

Although difficulties have occasionally arisen in the application of the doctrine, this Court's cases have provided a straightforward test for identifying work product in the first instance. The definition itself is seemingly capable of application in every case. Work product is that which is done in anticipation of litigation, in preparation of one's defense. That definition is explicit in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which partially codifies *Hickman*'s holding, and thus allows discovery of work product only in limited circumstances:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and *prepared in anticipation of litigation or for trial* by or for another party or by or for that party's representative (including the other party's attorney, consultant . . . or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . . (emphasis added)

Fed. R. Civ. P. 26(b)(3). The definition of work product—"things otherwise discoverable . . . prepared in anticipation of litigation"—follows directly from the underlying purpose of the rule, which is to allow a case to be defended and prepared for trial as the litigant believes

necessary, without fear that the product of its efforts will accrue to the benefit of its opponent.

To be sure, work product protection is not absolute. It can be overcome upon a showing of substantial need by the party seeking discovery. *Upjohn*, 449 U.S. at 400-01; *Hickman*, 329 U.S. at 511-12; Fed. R. Civ. P. 26(b)(3). Specifically, ordinary work product—i.e. compiled data, or "fact work product," as distinguished from "mental impressions"[8]—may be obtained from one's adversary upon a showing of "substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, 449 U.S. at 400; Fed. R. Civ. P. 26(b)(3).[9] Even then, disclosure of mental impressions and opinions is to be avoided.[10] But as is implicit in *Upjohn*, the existence or nonexistence of mental impressions does not go to whether the materials are work product, as the court below apparently believed, but instead goes to the degree of protection afforded to the material.

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[8] 4 J. Moore et al., Moore's Federal Practice ¶ 26.64[2] (2d ed. 1993) ("Material which is appropriately classified as work product can be divided into two general categories: (1) 'factual' work product, and (2) 'opinion' work product, that is material containing an attorney's mental impressions, conclusions, opinions or legal theories").

[9] *See Hickman*, 329 U.S. at 511 ("Where relevant and nonprivileged facts remain hidden in an attorney's file and *where production of those facts is essential to the preparation of one's case*, discovery may properly be had").

[10] *See* Fed. R. Civ. P. 26(b)(3). Opinion work product consists of attorney memoranda, notes and other work product revealing an attorney's mental processes, while ordinary work product encompasses the "residue." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988). Some courts provide absolute protection to opinion work product, *see Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975), while others provide "nearly absolute immunity," allowing discovery in "rare and extraordinary cases." *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *see Upjohn*, 449 U.S. at 401-02.

There was no attempt to show hardship or substantial need in this case.[11] Instead, the requirement for such a showing was pretermitted by the holding of the court below that inquiry into the efforts of these employees was permissible because those efforts, and the conclusions reached through those efforts, were somehow *not* work product at all, and that "there is no common law privilege" barring inquiry into the employees' methods and results. App. at 12a. The precise basis for the panel's conclusion that it could define such efforts as *non*-work product is difficult to discern.

A. The Second Circuit panel appears to have approached the issue as if it called for an *ad hoc* reconciliation of larger competing interests in determining what could be protected as work product.[12] Such an approach simply ignores this Court's cases, which have already drawn the proper balance. Under the cases of this Court, whether something is work product is determined as a matter of fact, based upon whether it was prepared in anticipation of litigation. The only occasion for balanc-

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[11] Rather than make a showing of need, the government contented itself with the bold and circular assertion that it needed to obtain information about these analyses from these witnesses because it could not obtain information about these analyses from other sources, and that it needed these analyses because it might "provide the government with evidence relevant to crimes currently under investigation." App. at 29a.

[12] In approaching both the work product and the attorney-client issues, the court below saw itself as reconciling two overriding policies:

> Squarely presented for reconciliation are the seemingly conflicting interests of disclosure and secrecy. Discovery, designed to advance the pursuit of truth, takes the 'sporting' element out of litigation by eliminating surprise. The inviolability of confidential communications between attorney and client and the protected privacy of the attorney's work product also contribute to the efficient functioning of the adversarial system's search for truth.

App. at 3a.

ing is in determining whether something that is work product must nonetheless be divulged on the basis of a showing of "substantial need" that is absent from the record in this case.

B. The courts below appear to have been skeptical about the application of work product protection to the efforts of litigants on their own behalf, in this case, the efforts of employees of the corporation being investigated. That skepticism has no basis. The language of Rule 26(b)(3) makes it clear that work product protection is *not* limited to the efforts of *an attorney*, but naturally covers a litigant's *own* efforts, in its own behalf, in anticipation of litigation or trial ("prepared in anticipation of litigation or for trial *by* . . . another *party* or by or for that other party's *representative* (including the other party's . . . *agent*) . . ."). *Compare* App. at 11a ("the affidavits . . . undercut . . . the privileged nature of much of the information as *attorney's* work product").

As the language of Rule 26(b)(3) reflects, the policy underlying the work product immunity could require no less protection for a party's own efforts than for those of its attorney. A party has no less right to prepare its own defense, enlist the assistance of its employees, and put its employees at the disposal of outside counsel, than it does to retain an outside lawyer to assist in its defense in the first instance. Where counsel specially retained for litigation actually directs the gathering of facts and preparation of materials, as here, it only confirms that the materials have truly been generated in anticipation of litigation.

C. In applying its approach, the panel ultimately held that no privilege prevented inquiry into these employee efforts because it perceived no "judgments," "estimates" or "mental impressions" in the results—only "straightforward calculations from raw data." App. at 11a. That approach is in error because it confuses the inquiry about

"whether something is work product at all" with the question "whether the work product warrants the special protections afforded mental impressions."[13] *Compare Upjohn*, 449 U.S. at 399-400. If something does not contain "mental impressions," that is not dispositive of whether it is work product. To the contrary, work product usually and ordinarily refers to the compilation and collection of *facts*. *See* Fed. R. Civ. P. 26(b)(3). Once it is recognized that the fact-gathering was done in anticipation of litigation—as all parties and the courts below acknowledged throughout—then that process, its product, and the conclusions drawn from it, are "work product" protected by *Hickman v. Taylor* and Rule 26. No work product of *any* variety may be discovered by an opponent, except upon a showing of hardship and substantial need. By its failure to respect this principle founded in the plain language of the Rule and in this Court's decision in *Upjohn*, 449 U.S. at 399-400, the Second Circuit's decision is in direct conflict with other circuits that recognize the protection owing to "fact" or "ordinary" work product, as well as to "opinion" work product.[14]

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[13] It is difficult to see how these employees' conclusions could *not* be regarded as "mental impressions." The very nature of the task that these employees were assigned conveys important information about defense counsel's theory of the case. *See Upjohn*, 449 U.S. at 399-400. *See generally Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985) (counsel's selection and compilation of documents reveals important aspects of counsel's understanding of the case and is therefore considered to be opinion work product).

[14] *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 983 (4th Cir. 1992); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732-33 (4th Cir. 1974); *In re Int'l Sys. & Controls Corp.*, 693 F.2d 1235, 1239-40 (5th Cir. 1982); *Toledo Edison Co. v. G A Technologies, Inc.*, 847 F.2d 335, 339-40 (6th Cir. 1988); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*,

D. In holding that fact gathering and analysis by employees was *not* work product, the Second Circuit appeared to be moved by the following concern: "[M]erely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects of the Fox contracts under either claim of privilege." App. at 10a. The district court's holding that the analyses of these employees and their conclusions from those analyses were "underlying facts" seems to reflect a similar concern.

But the proper application of the work product rule does not trigger such concerns. Work product does not shield the underlying facts from discovery. The work product doctrine, just as the attorney-client privilege, "puts the adversary in no worse position than if the communications had never taken place." *Upjohn*, 449 U.S. at 395; *see also Hickman*, 329 U.S. at 513. Thus, the government was free in this case to ask about what the witnesses knew before they began their investigations for counsel. The government was also free to ask the witnesses directly for their opinions, including their opinions about what documents might be relevant. *Compare* App. at 5a. But it is a different matter entirely to ask the witnesses to describe the analyses that were done *for* counsel, the documents reviewed in connection with that effort, the information obtained in the course of that effort, and the conclusions they reached from those efforts. That is precisely what the government sought here.[15] That in-

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860 F.2d 844, 846 (8th Cir. 1988); *In re Murphy*, 560 F.2d 326, 329 n.1, 334 (8th Cir. 1977); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982); Moore et al., *supra* note 8.

[15] In the context of this case, where it was established that the witnesses' only "analysis" was that performed for counsel, questions such as "[W]hat analysis did you perform?," "What records did you review?," and "What conclusions did you draw?" are not addressed to *pre-existing facts*, i.e. facts that the witnesses knew prior to the government's investigation. Such questions elicit that which

quiry was improper (absent a showing of a need) because it sought that which had been created only by virtue of the litigation itself.

In contrast with the decision below, other courts have had little difficulty drawing a clear line between pre-existing knowledge (which is underlying fact), and knowledge acquired in anticipation of litigation (which is work product). In *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 987, 988 (D.C. Cir. 1980), the court thus applied Fed. R. Civ. P. 26(b)(4)(B) to the work product of an expert who "wore two hats—that of a general consultant [with knowledge of the underlying facts] and that of an expert engaged in preparation for litigation." The distinction which the court drew there was precisely what the work product rule requires: Plaintiff "could have orthodox discovery of facts known or opinions held by [the consultant] prior to the time at which he began to devote his talents to the litigation . . . but not with respect to information developed thereafter." The information developed *for* the litigation was protected. Therefore, on this issue as well the decision of the court below is in conflict with the approach taken in other circuits.

In declining to apply the definition of work product employed by this Court and the Federal Rules, and in its refusal to afford work product protection to fact work product created by company employees (rather than attorneys) in defense of the company, the decision below creates a work product rule in the Second Circuit that is in fundamental conflict with the decisions of this Court, and other circuit courts, applying the clear language of this Court's cases.

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was generated for counsel after the Company learned it was the target of the grand jury investigation. *See Hickman*, 329 U.S. at 510.

II. THE DECISION BELOW CREATES A SERIES OF ANOMALIES AND UNDERMINES THE ATTORNEY-CLIENT PRIVILEGE

The decision creates a host of anomalies in the application of the work product and attorney-client privileges. For example, it was conceded by the government that copies of the written reports prepared by the employee-witnesses were protected—at least by the attorney-client privilege. On the other hand, the government argued, and the courts below held, that the government could effectively pierce that restriction by simply asking the witnesses to testify orally about what they had done. Thus, while the facts gathered, and conclusions drawn, were deemed protected in their written manifestations, the intangible work product (that is, tangible work product in oral or unwritten form [16]) could be freely inquired into. The anomalies are apparent.

The form of the inquiry and the form of the work product itself (whether it is in some tangible form, i.e. a document, or whether it simply resides in the memory of the witness) should be irrelevant in assessing work product protection.[17] *Hickman* itself involved a situation

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[16] *See Special Project, The Work Product Doctrine*, 68 Cornell L. Rev. 760, 839 (1983).

[17] In the lower courts, the government argued that the work product privilege "shields only prepared materials" such as "documents or other tangible things." App. at 28a.

Although Rule 26(b)(3) pertains to "documents and tangible things . . . prepared in anticipation of litigation," courts have held that work product principles should not be read to imply that "mental impressions *not* embodied in documents are otherwise discoverable." *Ford v. Phillips Elecs. Instruments, Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979); *see also International Business Machs. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975); Moore et al., *supra* note 8, ¶ 26.64[1] (*Hickman* is broader than Rule 26). The same "'general policy against invading the privacy of an attorney's course of preparation' of a case" enunciated in *Hickman* applies regardless of whether the work product is elicited through oral testimony or otherwise. *Ford*, 82 F.R.D. at 360, *quoting Hickman*,

where an attorney had been asked to provide a written description of oral conversations with witnesses. Thus, he was asked to provide in writing what was, up until then, merely "intangible"—his knowledge of conversations with witnesses. Indeed, *Hickman* made clear that certain materials, such as oral conversations with witnesses, could not be inquired into "whether presently in the form of . . . mental impressions or memoranda." 329 U.S. at 512. Thus, *Hickman* indicated that the *form* of the material, whether tangible or intangible, was irrelevant to its eligibility for the protection of the work product rule.

For a similar reason, under the approach of the court below, the protection afforded by the attorney-client privilege becomes illusory. The court below was careful to hold that the government could not elicit testimony about whether these witnesses spoke to the attorney in reporting on their efforts, or what they said directly to the attorney.[18] App. at 11a. The government ought not be free to avoid the privilege's protections by substituting for the clearly impermissible questions, "What did the at-

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329 U.S. at 512; *see also Special Project, The Work Product Doctrine*, 68 Cornell L. Rev. 760, 839-43 (1983) (the "correct result" is "equal treatment of the oral and written work product"). Indeed, it is *Hickman* that supplies the immunity. The Federal Rules simply define an exception allowing discovery with respect to the production of documents. When work product is sought through testimony rather than through discovery of documents, "one must revert to the principles enunciated in *Hickman*." Moore et al., *supra* note 8, ¶ 26.64[1] at page 26-349.

[18] The attorney-client privilege also protects from disclosure the substance of the attorney-client communications, including information that was learned from counsel. As described in *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989), the privilege applies "regardless of the manner in which it is sought to put the communications in evidence, whether by direct examination, cross-examination, or *indirectly as by bringing out facts brought to knowledge solely by reason of a confidential communication*" (emphasis in the original).

torney tell you?" or "What did you tell the attorney?," questions such as "What did you do, learn, and conclude after your attorney instructed you to conduct an analysis?"

The invasion into attorney-client communications and advice allowed by the lower court's interpretation of the work product rule is plain. In order to carry the proponent's burden of establishing the basis for a claim of privilege, the employee-witnesses made clear through their responses to the Category I questions that any analysis performed had been performed for counsel and provided to counsel. App. at 27a. *See Upjohn*, 449 U.S. at 394. In seeking the analyses and conclusions of these witnesses as a result of these studies, the government was undermining the attorney-client privilege just as surely as if it had asked directly about what transpired in the attorneys' office.

III. THE DECISION BELOW PRESENTS A CLEAR CONFLICT WITH THE PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW

The opinion below is not only wrong, but debilitating in its practical effect on litigation in the federal courts. That is because the work product doctrine "is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." *Nobles*, 422 U.S. at 238. Because such assistance is so often necessary, the decision below will have an immediate and far-reaching effect on the conduct of virtually every case involving complex facts. Although the party seeking the work product here was the government, the rule announced by the court below—denying work product protection to the efforts of company employees in preparation of a defense—applies by

its terms to any case now pending or anticipated, whether pursued by a private litigant or a prosecutor.

Thus, corporate litigants and their attorneys are now confronted with the dilemma that if they enlist the aid of their employees in the defense and preparation of the case, they risk creating a record that may be inimical to their ultimate interests. At a minimum, they must consider whether by engaging in any particular factual investigation, they will thereby be making their adversary's task that much easier.

Those attorneys who read the decision below as limited only to the work product efforts of *employees*, may resort to outside consultants to develop facts, thus increasing the costs of litigation and, more fundamentally, depriving a litigant of its right to participate fully and knowledgeably in its own defense. On the other hand, those who elect to curtail their efforts, in deference to the risk of disclosure created by the decision of the court below, will be deprived of the full investigation and preparation that our adversary system demands. Litigants will suffer that prejudice to their case without recourse because they cannot appeal an erroneous rule of law with which they have complied.

Litigants who ignore the decision below will act at their peril. If their work product is ordered to be disclosed to their opponent, even they are unlikely to have ready recourse to the courts of appeals, or to this Court, to address the issue because of the interlocutory nature of most privilege rulings.

This is therefore a case in which the decision of the court below is directly in conflict with the decisions of this Court and those of other courts of appeals. It will (if not reversed now) have an immediate and extraordinarily far-reaching effect upon a great many cases, prejudicing many parties, for a long time to come.[19]

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[19] This case is particularly well-suited for review by this Court because there are no documents, depositions or other unwieldly

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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discovery materials to review in connection with these claims of privilege. The specific questions at issue are set forth in the appendix to the opinion of the court below. The facts are—as the court below remarked—"straightforward and undisputed."